



**ATTORNEY GENERAL OF TEXAS**  
**GREG ABBOTT**

May 28, 2004

Mr. Jeff D. Kelley  
Assistant County Attorney  
Johnson County  
2 North Main Street  
Cleburne, Texas 76031

OR2004-4402

Dear Mr. Kelley:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "Act"), chapter 552 of the Government Code. Your request was assigned ID# 202546.

The Johnson County Sheriff's Office (the "sheriff") received three requests for information related to a particular case. You indicate that some responsive information has been released. You claim that the sheriff need not comply with these requests pursuant to section 552.028 of the Government Code. In the alternative, you claim that the submitted information is excepted from disclosure under sections 552.101, 552.103, 552.108, and 552.130 of the Government Code.<sup>1</sup> We have considered the exceptions you claim and reviewed the submitted information.

Before addressing your arguments for the submitted information, we note that some of the submitted documents appear to have been produced in response to grand jury subpoenas. This office has concluded that grand juries are not governmental bodies that are subject to chapter 552 of the Government Code, so that records that are within the actual or

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<sup>1</sup> As you did not submit to this office written comments stating the reasons why sections 552.107 and 552.111 would allow the information to be withheld, we find that you have waived these exceptions. *See* Gov't Code §§ 552.301, .302. Additionally, we note that while you claim that the requested information is also excepted under sections 552.023, 552.229, and 552.307, these provisions do not constitute exceptions to disclosure. Rather, section 552.023 addresses a requestor's special right of access to information that is otherwise confidential, while sections 552.229 and 552.307 are procedural in nature.

constructive possession of a grand jury are not subject to disclosure under chapter 552. *See* Open Records Decision No. 513 (1988). When an individual or entity acts at the direction of the grand jury as its agent, information prepared or collected by the agent is within the grand jury's constructive possession and is not subject to chapter 552. *Id.* at 3. Information that is not so held or maintained is subject to chapter 552 and may be withheld only if a specific exception to disclosure is applicable. *Id.* Thus, to the extent that the information at issue is in the custody of the sheriff as agent of the grand jury, it is not subject to disclosure under chapter 552. *Id.* at 4. However, to the extent that this information is not in the custody of the sheriff as agent of the grand jury, it is subject to disclosure under chapter 552. In that event, we address your claims for this information, as well as for the remaining submitted information.

Section 552.028 of the Government Code provides as follows:

(a) A governmental body is not required to accept or comply with a request for information from:

- (1) an individual who is imprisoned or confined in a correctional facility; or
- (2) an agent of that individual, other than that individual's attorney when the attorney is requesting information that is subject to disclosure under this chapter.

(b) This section does not prohibit a governmental body from disclosing to an individual described by Subsection (a)(1), or that individual's agent, information held by the governmental body pertaining to that individual.

Gov't Code § 552.028. You note that the sheriff received two prior requests for the same information and that you previously requested opinions from this office, with respect to such information. In response, this office issued Open Records Letter Nos. 2004-3083 (2004) and 2003-5248 (2003). In those rulings, we concluded that section 552.028 of the government Code permits the sheriff to decline to accept or comply with the requests for information. Although you state that the similarity of the instant requests to those prior requests received by the sheriff "indicate[s] that" the requestors are acting on behalf of an inmate who is currently confined in the Texas Department of Criminal Justice Institutional Division, you have not affirmatively represented to this office that such is the case. Whether an individual is acting as an agent of an imprisoned individual is a factual determination that this office cannot make in the open records process. Open Records Decision Nos. 554 (1990), 552 (1990). Consequently, we must rely on the representations of the governmental body requesting our opinion. *Id.* Because you have not represented to this office that either requestor in fact is acting as an agent of an imprisoned individual, we cannot conclude that

section 552.028 is applicable in this instance. We therefore must address your other arguments for non-disclosure regarding the information at issue.

We next address the applicability of section 552.101 of the Government Code, which excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." This section encompasses confidentiality provisions such as section 261.201 of the Family Code. Section 261.201(a) provides:

(a) The following information is confidential, is not subject to public release under Chapter 552, Government Code, and may be disclosed only for purposes consistent with this code and applicable federal or state law or under rules adopted by an investigating agency:

- (1) a report of alleged or suspected abuse or neglect made under this chapter and the identity of the person making the report; and
- (2) except as otherwise provided in this section, the files, reports, records, communications, audiotapes, videotapes, and working papers used or developed in an investigation under this chapter or in providing services as a result of an investigation.

Fam. Code § 261.201(a). You indicate that the submitted information is encompassed by chapter 261 of the Family Code. Upon review of the submitted information, however, we determine that the information does not constitute a file, report, record, communication, or working paper used or developed in an investigation under chapter 261 or in providing services under chapter 261. Accordingly, we conclude that the sheriff may not withhold any portion of the submitted information under section 552.101 of the Government Code in conjunction with section 261.201 of the Family Code.

Section 552.101 also encompasses the doctrine of common-law privacy, which protects information that is 1) highly intimate or embarrassing, such that its release would be highly objectionable to a reasonable person, and 2) not of legitimate concern to the public. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976).

The type of information considered intimate and embarrassing by the Texas Supreme Court in *Industrial Foundation* included information relating to sexual assault, pregnancy, mental or physical abuse in the workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs. *Id.* at 683. Generally only the information that either identifies or tends to identify a victim of sexual assault or other sex-related offense may be withheld under common-law privacy. However, a governmental body is required to withhold an entire report when identifying information is inextricably intertwined with other releasable information or when the requestor knows the identity of the alleged victim. *See* Open Records Decisions Nos. 393 (1983), 339 (1982); *see also Morales*

*v. Ellen*, 840 S.W.2d 519 (Tex. App.—El Paso 1992, writ denied) (identity of witnesses to and victims of sexual harassment was highly intimate or embarrassing information and public did not have legitimate interest in such information); Open Records Decision No. 440 (1986) (detailed descriptions of serious sexual offenses must be withheld). In this instance, the information that we have marked pertains to an investigation of alleged sexual assault and the requestor knows the identity of the alleged victim; thus, withholding only the identifying information from the requestor would not preserve the victim's privacy rights. We therefore conclude that the sheriff must withhold the information that we have marked pursuant to the common-law privacy principles incorporated by section 552.101.

You assert that the remaining submitted information, excluding Exhibit R, is excepted from disclosure under section 552.108 of the Government Code. Section 552.108(a) excepts from disclosure "[i]nformation held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime . . . if: (1) release of the information would interfere with the detection, investigation, or prosecution of crime." Generally, a governmental body claiming section 552.108 must reasonably explain how and why the release of the requested information would interfere with law enforcement. *See Gov't Code* §§ 552.108(a)(1), (b)(1), .301(e)(1)(A); *see also Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977). You state that the information at issue relates to a pending criminal prosecution in which the defendant "has not exhausted all [of his] postconviction remedies." Based on your representations and our review, we determine that the release of the information at issue would interfere with the detection, investigation, or prosecution of crime. *See Houston Chronicle Publ'g Co. v. City of Houston*, 531 S.W.2d 177 (Tex. Civ. App.—Houston [14th Dist.] 1975), *writ ref'd n.r.e. per curiam*, 536 S.W.2d 559 (Tex. 1976) (court delineates law enforcement interests that are present in active cases). Therefore, we conclude that you have demonstrated the applicability of section 552.108(a)(1) to the information that we have marked.

We note, however, that information normally found on the front page of an offense report is generally considered public. *See generally Gov't Code* § 552.108(c); *Houston Chronicle Publ'g Co.*, 531 S.W.2d 177; Open Records Decision No. 127 (1976). Thus, you must release the types of information that are considered to be front page offense report information, even if this information is not actually located on the front page of the offense reports. Although section 552.108(a) authorizes you to withhold the remaining information at issue from disclosure, you may choose to release all or part of the information that is not otherwise confidential by law. *See Gov't Code* § 552.007.

With regard to the information submitted in Exhibit R, we note that these records include a social security number that may be excepted from disclosure pursuant to section 552.101 in conjunction with federal law. The 1990 amendments to the federal Social Security Act, 42 U.S.C. § 405(c)(2)(C)(viii)(I), make confidential social security numbers and related records that are obtained or maintained by a state agency or political subdivision of the state pursuant to any provision of law enacted on or after October 1, 1990. *See Open Records Decision*

No. 622 (1994). The sheriff has cited no law, nor are we aware of any law, enacted on or after October 1, 1990, that authorizes it to obtain or maintain social security numbers. Therefore, we have no basis for concluding that the social security number contained within this information is confidential under section 405(c)(2)(C)(viii)(I) of title 42 of the United States Code. We caution the sheriff, however, that section 552.352 of the Government Code imposes criminal penalties for the release of confidential information. Prior to releasing this social security number, the sheriff should ensure that it was not obtained and is not maintained by the sheriff pursuant to any provision of law enacted on or after October 1, 1990.

Finally, we note that a portion of the submitted information in Exhibit R is excepted from disclosure pursuant to section 552.130 of the Government Code. Section 552.130 excepts from disclosure information that relates to a motor vehicle operator's or driver's license or permit issued by an agency of this state or a motor vehicle title or registration issued by an agency of this state. *See* Gov't Code § 552.130. Accordingly, we conclude that the sheriff must withhold the Texas motor vehicle information that we have marked pursuant to section 552.130 of the Government Code.

In summary, to the extent that the information at issue is in the custody of the sheriff as agent of the grand jury, it is not subject to disclosure under chapter 552. However, to the extent that this information is not in the custody of the sheriff as agent of the grand jury, we conclude as follows regarding it and the remaining submitted information: (1) the sheriff must withhold the information that we have marked under section 552.101 of the Government Code and common-law privacy; (2) with the exception of basic information, which must be released, the sheriff may withhold the information that we have marked under section 552.108 of the Government Code; (3) a social security number may be confidential under federal law; and (4) the sheriff must withhold the Texas motor vehicle information that we have marked pursuant to section 552.130 of the Government Code. The remaining submitted information in Exhibit R must be released.<sup>2</sup>

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days.

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<sup>2</sup>As we are able to make these determinations, we need not address your remaining arguments.

*Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877)673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at (512)475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Cindy Nettles  
Assistant Attorney General  
Open Records Division

CN/jh

Ref: ID# 202546

Enc. Submitted documents

c: Mr. Ed Mathews  
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